

GOVERNMENT

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Justices grill Maryland on Potomac River dispute

BY PETER GEIER

Daily Record Legal Affairs Writer

The Potomac is Maryland's river; what the **Supreme Court** must decide after yesterday's oral argument is the extent to which Virginia can use it without Maryland's permission.

The dispute arose over Fairfax County (Va.) Water Authority's protracted litigation to obtain Maryland's permission to construct a new water intake 725 feet — about halfway — across the Potomac River.

Maryland has since granted the water authority permission to build the intake, which has been constructed and is operational.

However, Virginia claims that Maryland's key motive in wanting to control the tap is a desire to control growth and development across its southern border in the sprawling bedroom communities, like Northern Virginia's Fairfax County.

On the plaza outside the building after the argument, Virginia Attorney General Jerry W. Kilgore harked back to that point.

"We believe that Maryland wants to control Virginia and we do not believe that there is any justification for that move," Kilgore said, adding that he did "not think that Virginia should be made to jump through any hoops to get water for its citizens."

Kilgore said he hoped the court would accept the recommendations of the Supreme Court-appointed special master, who found

last December that Virginia has the right to construct improvements from their shores and to take water from the river free of Maryland regulation.

"We're hopeful that the court will accept the special master's holding and we'll move on from there," Kilgore said.

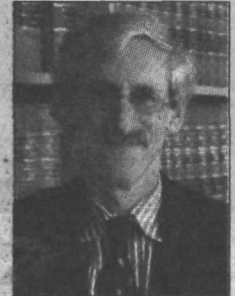
Maryland Attorney General J. Joseph Curran Jr. said all Maryland wants is the right to control what happens within its borders.

"As the owner" of the Potomac, Curran said, "someone has to be able to make reasonable decisions as to the river's use."

Andrew H. Baida, the former

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Andrew H. Baida



solicitor general who argued Maryland's case yesterday, pointed out that in history, "no one besides Maryland has taken the responsibility for regulating the river."

And Maureen M. Dove, Curran's chief of civil litigation, noted that when Virginia's counsel told

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the justices that Maryland licensed three Virginia restaurants on the river while Virginia was the permitting authority for more than 300 docks, wharves and jetties, those latter constructions were licensed on the basis of their added value to the land, not their location on the river.

However, Curran said that if Maryland does not prevail, "life will go on" with Maryland's southern neighbor.

"We've enjoyed a good relationship since 1632, and we would expect that to continue," Curran said.

'Better off rural'

During the oral argument, Justice Sandra Day O'Connor asked Baida whether Mary-

land was "adversely affected by this kind of underwater intake. Is Maryland impacted or is Maryland just saying we are the sovereign?"

"Maryland has the right to regulate what takes place in its territory," Baida replied. "A right of use is not dominion, it's not title, it's not sovereignty ... a right of use is subject to government regulation."

Justice Antonin Scalia, noting that Virginia clearly has some right to the water, facetiously asked whether that was a "right to take water out of the river or a right to come ask Maryland to take water?"

Justice Anthony M. Kennedy explored the possibility that riparian rights on both sides of the river are subject to regulation by Maryland, which theoretically could give Maryland the power to allow "higher priority to citizens of Rockville than to the citizens of Vienna, Virginia," Kennedy said.

When Baida replied that Maryland regulators would not act in such an "arbitrary

and capricious" manner, Kennedy said "No: they would make a lot of arguments and come up with a finding" to the effect that "there's too much traffic in Virginia. Virginia would be better off it was rural."

Commenting on Maryland's claim that its rights were based on "the plain language of the charter," Chief Justice William H. Rehnquist asked Baida if a 1785 compact between the two states — reached after a weekend meeting hosted by George Washington at his Mount Vernon home — as well as the 1877 federal arbitrators' Black-Jenkins Award, were "simply wrong"?

Not in the least, Baida said.

"Maryland's title has not changed one iota in almost 400 years," Baida said.

Short a few sticks

Stuart A. Raphael, who argued Virginia's case, argued in essence that no state should ever be permitted to regulate the activities of

another state.

"Maryland's argument is that it always had every stick in the bundle of sticks but this just isn't the case," Raphael said.

"What if Maryland claims [the intake] obstructs navigation?" O'Connor asked him, to which he replied the "key evidence" came during settlement of a border dispute between the states in 1873.

"Maryland's view was that it was entirely up to Virginia to decide when, whether and where to build improvements from the shore," Raphael said.

For Baida and Raphael, it was each lawyer's first time arguing a case before the Supreme Court bench.

After leaving the courtroom, Raphael said he and Baida had developed mutual respect and a good working relationship during the litigation.

Baida agreed, and said of the case only: "Boy! I'm sure glad that's all over."